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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1214

HAROLD LOYD LONG,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The petitioner, Harold Loyd Long, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals for the State of Texas in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Criminal Appeals for the State of Texas was entered on December 10, 1975. Leave to file a motion for rehearing was denied on January 21,

1976, (attached hereto as Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the three hundred and fifty pounds of marijuana introduced as evidence at the petitioner's trial was seized in violation of the search and seizure provision of the Fourth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The sheriff of Wise County, Texas, received three reports of aircraft circling and landing in a rural section of the county. On the third occasion the sheriff went to the area and observed one aircraft take off while another aircraft circled overhead. The departing aircraft only used its landing lights for a very brief period to allow the aircraft to clear the ground. The runway lights were turned off after the aircraft cleared the ground.

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Two weeks later the sheriff and one of his deputies decided to visit the property to conduct further investigation. The house was located 200 - 300 yards from the nearest neighbor, and ninety (90) feet from a farm to market road. The sheriff did not know who lived on the property. Upon arriving, they parked in the driveway and knocked on the door facing the carport of a small frame house. After receiving no answer, the two officers walked to the back of the house and knocked on the back door. Again they received no answer. They then continued around the house, intending to return to their car. As they passed a window on the west side of the house, they felt a hot blast of air and the smell of marijuana coming from the window. The blinds of the window were open and the officers observed a large quantity of marijuana scattered over the floor of a room with a fan blowing air over the marijuana.

The sheriff returned to his office and obtained a search warrant. The house was then placed under observation by a large number of law enforcement officers. The petitioner was seen driving up to the residence and entering it. He was observed making numerous trips between the house and a trailer and the house and an old school bus. The officers executed the search warrant on October 11, 1973, two days after it was obtained. The appellant was found sleeping in the house along with several other people. Marijuana was found in the house, the trailer and the bus.

Prior to the trial of the case, a hearing was held on the petitioner's Motion to Suppress. Petitioner's objection to the search was that the initial warrantless search was illegal and that the subsequently obtained search warrant (and the fruits

obtained therefrom) was fatally tainted. The trial court denied the motion and an exception was taken. The issue was raised on appeal, but the Court of Criminal Appeals of the State of Texas affirmed, holding that observations through an open window did not amount to a search, citing *Turner v. State* 499 S.W.2d 182 (Tex. Crim. App. 1973), and that one so foolish as to leave his window open could not complain if another observes illegal activity, citing *Gil v. State*, 394 S.W. 2d 810 (Tex. Crim. App. 1965); *Johnson v. State*, 469 S.W.2d 581 (Tex. Crim. App. 1971); and *Turner v. State, supra.*

REASONS FOR GRANTING THE WRIT

Searches conducted outside the judicial process, without prior approval by a magistrate, are *per se* unreasonable, under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347 (1967). The exceptions are jealously and carefully drawn, *Jones v. United States*, 357 U.S. 493 (1958), and there must be a showing by those who seek exemption that the exigencies of the situation made the course imperative. *McDonald v. United States*, 335 U.S. 451 (1948).

Under the facts of the present case, if the observation through the open window was the result of an unlawful intrusion, then the marijuana seized as a result of the search warrant issued after the intrusion would be "fruit of the poison tree" and excludable, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Wong Sun v. United States*, 371 U.S. 471 (1963), the protection of the Fourth Amendment being applicable to state searches through the "due

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process" clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

One of the exceptions to the warrant requirement of the Fourth Amendment is the "plain view" doctrine. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure. *Harris v. United States*, 390 U.S. 234 (1968); *Hester v. United States*, 265 U.S. 57 (1925). The Texas Court of Criminal Appeals affirmed the conviction below upon this exception, although stressing the "open window" as talismanic to a waiver of the protection of the Fourth Amendment. The true issue involved is whether the officers had a right to be outside the window. The test for determining the issue is a balancing test between the petitioner's reasonable expectation of privacy and the government's power to investigate suspicious activities.[1]

The Fourth Amendment protects against any invasion of a person's reasonable expectation of privacy. *Katz v. United States, supra; Mancusi v. Deforte*, 392 U.S. 364 (1968). There is not much dispute that a person is entitled to a reasonable expectation of privacy in his own home. *Weeks v. United States*, 232 U.S. 383 (1914). In *Brock v. United States*, 223 F.2d 681 (5 Cir. 1955), the circuit court reversed a conviction for operating a still after a law enforcement official obtained incriminating evidence by going upon the defendant's property, making observations through a window and conversing with the defendant through the window. The opinion stated:

"Whatever quibbles there may be as to where the curti-

[1] United States v. Magana, 512 F.2d 1169 (9 Cir. 1975).

> lage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be left alone' as guaranteed by the Fourth Amendment. *McDonald v. United States* (335 U.S. 451)." (footnotes omitted)

And in *United States v. Holmes*, 521 F.2d 859 (5 Cir. 1975), the circuit court held that whatever precautions a homeowner in an urban area might have to take to protect his activities from the senses of a casual passerby, a dweller in arural area has a somewhat broader expectation of privacy.[2] See also *United States v. Davis*, 423 F.2d 974 (5 Cir. 1970).

The right of the law enforcement officer to be at the window must be based upon the officer's right to investigate suspicious activities. In *Terry v. Ohio*, 392 U.S. 1 (1968), and its companion cases, *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40 (1968), this Court recognized that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior. See also *Adams v. Williams*, 407 U.S. 143 (1972). However, *Terry* was limited by the requirement that police interference with citizens must be based upon "specific and articuable facts which, taken together with rational inferences from those facts, reasonably warrant" an intrusion into constitutionally protected areas. *Terry v. Ohio*, 392 U.S. at 21. Further, "[T]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 19.

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[2] See Rosencranz v. United States, 356 F.2d 310 (1 Cir. 1966), for a differentiation of the rural/urban environment with reference to probable cause originating from the sense of smell.

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Applying the above law to the facts of this case, it is apparent that the sheriff probably had the right to go to the home of the petitioner and knock on the front door to see if anyone was present. However, his right to further investigate ceased when no one answered his knock. The house was a small frame house. There was no testimony from the sheriff to indicate anyone was present (an automobile in the driveway; a radio or television operating in the house). The circumstances do not permit a further intrusion based upon the contention that the officer was "searching" for someone to answer the officer's questions about suspicious circumstances.

The mere fact that the contraband was observed through the open window[3] should not permit a broadening of the scope of the intrusion. The window was not observable from the front door. The nearest neighbor lived 200 - 300 yards from the house, and there is no evidence that the contraband could have been observed from any place outside of petitioner's property. The sheriff waited two weeks before beginning his "investigation." It is clear from the facts that the officer's intrusion beyond the front door of petitioner's rural residence was a violation of the petitioner's reasonable expectation of privacy, and should warrant the granting of this writ.

The decision of the Texas Court of Criminal Appeals is based upon an interpretation of law that is probably not in accord with the above decision of this Court. Further, the case involves an issue not precisely determined by this Court. Upon these grounds, the Court should grant this writ of certiorari.

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[3] See Olivera v. State, 315 So.2d 487 (Fla. App. 1975).

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas.

Respectfully submitted,

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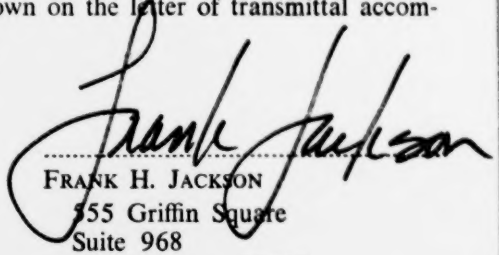
CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Hon. John Hill, Attorney General, Capitol Station, Austin, Texas 78711, on the same date as shown on the letter of transmittal accompanying this Petition.



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